FILED
FEB 4 - 2008
OFFICE OF THE CLERK
SUPREME COURT

No. 07-740

IN THE

Supreme Court of the United States

DEVIN DANIELS; BRYCE CLEMENTS; DAIMON FULLERTON; NICOLE MORROW; AND MAREN BETH SANDLER,

Petitioners,

v.

PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO CO.; BROWN & WILLIAMSON HOLDINGS, INC.; AND LORILLARD TOBACCO CO.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

BRIEF IN OPPOSITION

DANIEL P. COLLINS
Counsel of Record
GREGORY P. STONE
FRED A. ROWLEY, JR.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Counsel for Respondents

[*Additional Counsel Listed on Inside Cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

GERALD L. MCMAHON
DANIEL E. EATON
SELTZER CAPLAN
MCMAHON VITEK
750 B Street, Suite 2100
San Diego, California 92101-8122
(619) 685-3003

Counsel for Respondent Philip Morris USA, Inc.

H. JOSEPH ESCHER III
DECHERT LLP
One Market Street
Steuart Tower, Suite 2500
San Francisco, California 94105
(415) 262-4500

WILLIAM T. PLESEC
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939

Counsel for Respondents R.J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc. (formerly known as Brown & Williamson Tobacco Corporation)

WILLIAM S. BOGGS
BRIAN A. FOSTER
DLA PIPER US LLP
401 B Street, Suite 2000
San Diego, California 92101-4240
(619) 699-2700

Counsel for Respondent Lorillard Tobacco Company

RULE 29.6 STATEMENT

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

Effective July 30, 2004, a transaction was completed whereby R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business. Effective August 2, 2004, Brown & Williamson Tobacco Corporation, a Delaware corporation, changed its name to Brown & Williamson Holdings, Inc. Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some publicly-held securities are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued pub-

licly-owned bonds. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

I. The California Supreme Court's Preemption Holding Does Not Raise Any Conflict and Simply Applies This Court's Controlling Decision in *Lorillard* to the Specific Facts of This Case 9

A. *Lorillard* Settled the Preemption Question Presented Here 10

B. The Opinion Below Does Not Conflict with Any Decision of this Court or of Any Other Appellate Court 12

C. Because the California Supreme Court's Decision to Overrule *Mangini* Also Rested on Changes in State Law, this Case Presents a Poor Vehicle for Reviewing Any Preemption Issue 15

D. The Opinion Below Does Not Give Respondents a "License" to Engage in Youth Marketing 17

II. The California Supreme Court's First Amendment Holding Correctly Applies Well-Settled Law to the Facts of this Case 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 6

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 3, 14

Brown v. Brown & Williamson Tobacco Corp.,
479 F.3d 383 (5th Cir. 2007) 14

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) ..... passim

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 2, 3, 13, 14

Dunagin v. City of Oxford,
718 F.2d 738 (5th Cir. 1983) 21

English v. General Elec. Co.,
496 U.S. 72 (1990) 17

Gade v. National Solid Wastes Management Assn.,
505 U.S. 88 (1992) 16, 17

Good v. Altria Group, Inc.,
501 F.3d 29 (1st Cir. 2007), *cert. granted*,
76 U.S.L.W. 3240 (Jan. 18, 2008) 14, 15, 16

Greater New Orleans Broadcasting Assn. v. United States,
527 U.S. 173 (1999) 21

In re Tobacco Cases II,
No. SDSC 719446, 2002 WL 31628649 (Cal. Super. Ct. Nov. 22, 2002) 4, 6, 19, 23

CASES—Continued

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) ..... passim

Mangini v. R.J. Reynolds Tobacco Co.,
7 Cal. 4th 1057, 875 P.2d 73 (1994) ..... passim

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,
545 U.S. 913 (2005) 22

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,
116 Cal. App. 4th 1253,
11 Cal. Rptr. 3d 317 (2004) 17

Pitt News v. Pappert,
379 F.3d 96 (3d Cir. 2004) 23

PLCM Group v. Drexler,
22 Cal.4th 1084, 997 P.2d 511 (2000) 6

Rockwood v. City of Burlington,
21 F. Supp. 2d 411 (D. Vt. 1998) 21

Thompson v. Western States Med. Ctr.,
535 U.S. 357 (2002) 23

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 21

STATUTES

7 U.S.C. § 136v(b) 14

15 U.S.C. § 1331 ..... 1, 2

15 U.S.C. § 1333 2

15 U.S.C. § 1334(b) 2, 10

15 U.S.C. § 1335 2

15 U.S.C. § 1336 ..... 2, 17

Cal. Bus. & Prof. Code § 17200 5

STATUTES—Continued

Cal. Penal Code § 308 ..... passim

Mass. Gen. Laws, ch. 93A, § 2 4

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 10

ADMINISTRATIVE DECISIONS

In re: R.J. Reynolds Tobacco Co., 127 F.T.C. 49 (1999) 17

INTRODUCTION

Petitioners, representing a certified class of Californians who smoked cigarettes as minors, seek review of the California Supreme Court's unanimous determination that their state-law challenge to Respondents' cigarette advertising is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (FCLAA), and violates the First Amendment. The Petition presents no cert-worthy issue and should be denied.

The underlying preemption issue raised by Petitioners was specifically addressed and resolved by this Court seven years ago in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The California Supreme Court's ruling simply conformed to *Lorillard* and overruled a prior inconsistent decision of that court. Beyond that, the decision below merely applies *Lorillard*'s preemption holding and settled First Amendment principles to the particular facts of this case, as presented by the parties on summary judgment after extensive discovery. The eleven judges below who have reviewed this case—in the trial court, the California Court of Appeal, and the California Supreme Court—all unanimously agreed that Petitioners failed to present sufficient evidence to establish a viable non-preempted claim. In sum, there is no split of authority on the preemption or First Amendment points, and Petitioners' factbound challenge to the California Supreme Court's correct application of settled law to this case does not warrant this Court's review.

STATEMENT

1. FCLAA creates "a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 541. As this Court has

explained, the purpose of this federal scheme is two-fold: (1) "to inform the public adequately about the hazards of cigarette smoking," and (2) "to protect the national economy from interference due to diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health." *Id.* at 542-43 (citing 15 U.S.C. § 1331); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514 (1992).

Congress sought to achieve these objectives by enacting a set of interrelated provisions that comprehensively address the subject of cigarette advertising, promotion, and labeling. In its current form, FCLAA requires manufacturers to include statutorily prescribed health warnings on all cigarette packages sold in the United States (15 U.S.C. § 1333); bans all radio and television advertising of cigarettes (*id.*, § 1335); and confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes" (*id.*, § 1336).

To further its stated goal of protecting the national economy from diverse and non-uniform regulations, Congress included an express preemption provision, which provides in relevant part:

> "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334(b). The "sweeping language" of this provision reflects Congress' intent to go beyond the subject of labeling by "further preclud[ing] States or localities from imposing *any* requirement or prohibi-

tion based on smoking and health with respect to the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 542 (emphasis added).

2. a. This Court first construed the scope of FCLAA's preemption provision in *Cipollone*, which involved a personal-injury suit brought by an individual smoker. 505 U.S. at 509-10. There, the Court held that common-law tort claims impose "requirement[s] or prohibition[s]" within the meaning of FCLAA, and are therefore preempted to the extent that they are applied "with respect to ... advertising or promotion" and are "based on smoking and health." 505 U.S. at 520-24 (plurality opinion); *see also id.* at 548 (opin. of Scalia, J.). A plurality of four Justices held that a common-law damages claim that imposed obligations with respect to advertising was "based on smoking and health"—and therefore preempted—if the *"legal duty that is the predicate"* of the particular claim is "based on smoking and health." *Id.* at 524 (emphasis added). Applying this standard, the plurality concluded that several of the plaintiffs' common-law claims were preempted, while others were not. *Id.* at 524-30.[1]

b. This Court again addressed the meaning of the "based on smoking and health" clause in *Lorillard*, which held that FCLAA preempted Massachusetts

---

[1] Applying a broader reading of the phrase "based on smoking and health," two Justices concurred in the plurality's judgment that certain claims were preempted. 505 U.S. at 544 (opin. of Scalia, J.). The remaining Justices concurred in the plurality's judgment that certain other claims were not preempted, based on their threshold view that common-law claims did not impose "requirement[s] or prohibition[s]" at all. *Id.* at 543 (opin. of Blackmun, J.). As noted above, a majority of the Court in *Cipollone* rejected this latter view, and the Court has since reaffirmed the majority's holding in *Cipollone* on that specific point. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

regulations (adopted pursuant to the State's generally applicable consumer protection statute, Mass. Gen. Laws, ch. 93A, § 2) that significantly restricted the placement of cigarette advertising in order to protect minors from exposure to it. 533 U.S. at 547-51. The Court rejected Massachusetts' "narrow construction" of the clause, *id.* at 547, holding that the regulations were "based on smoking and health" because the underlying concern about minors and cigarette advertising was inextricably "intertwined with the concern about cigarette smoking and health," *id.* at 548, and "inevitably motivated by concerns about smoking and health," *id.* at 550. The Court also held that a virtually identical set of regulations that were applicable only to the advertising of cigars and smokeless tobacco products (and thus outside of FCLAA's preemptive scope) violated the First Amendment. *Id.* at 556-67. Although the Court held that "the State's interest in preventing underage tobacco use is substantial, and even compelling," the regulations were "more extensive than necessary" to advance that interest. *Id.* at 564-65.

3. More than three years before this Court decided *Lorillard*, Petitioners brought this class action in California state court on behalf of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994 and December 31, 1999." Pet. App. 4a. The complaint alleged that Respondents undertook "systematic advertising efforts which appeal[ed] not only to adults, but also to children under the age of 18." *Id.* at 33a. In particular, the complaint averred that Respondents used "positive images" to make smoking appear "'glamorous,' 'cool,' 'strong,' 'macho,' 'tough,' or 'sophisticated.'" *In re Tobacco Cases II*, No. 719446, 2002 WL 31628649, at *1-*2 (Cal. Super. Ct.

Nov. 22, 2002); *see also* Pet. App. 106a, 86a.[2] Petitioners attached to the complaint several hundred magazine advertisements that they sought to challenge under California's unfair competition law. *See* Appellants' Appendix in the Cal. Ct. of App. at 51-447. In addition, the complaint alleged that Respondents placed such advertising in magazines with substantial youth readership (which, on the record at summary judgment, turned out to mean publications such as *Cosmopolitan*, *GQ*, *Rolling Stone*, *Vogue*, and *Vanity Fair*). *Id.* at 10-20; *see also* Respondents' Supp. Appendix in Cal. Ct. of App. at 831. Petitioners disavowed any injunctive relief, and instead sought restitution of all moneys spent for their illegal under-age cigarette purchases. *See* Appellants' Appendix in Cal. Ct. of App. at 37, 7909.

Based on these allegations, Petitioners asserted causes of action under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (UCL). The UCL authorizes a private right of action for "unfair competition," which the statute defines to include, *inter alia*, "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Although Petitioners did not contend that Respondents (who do not sell cigarettes at retail) had themselves unlawfully sold cigarettes to minors, Petitioners alleged that Respondents' *advertising* violated the UCL because it allegedly was intended to induce others to violate Cal. Penal Code § 308, which prohibits the sale of tobacco to minors. Pet. App. 5a, 34a.

After extensive discovery, Respondents moved for

---

[2] The Appendix to the Petition includes the trial court's order granting summary judgment to Respondents on preemption grounds, but it omits the trial court's order granting summary judgment on First Amendment grounds.

summary judgment on the grounds that Petitioners' youth advertising claim (1) was preempted by FCLAA's express preemption provision and (2) impermissibly burdened commercial speech protected by the First Amendment. On November 22, 2002, the trial court granted summary judgment to Respondents on both grounds. Pet. App. 78a-116a; *In re Tobacco Cases II*, 2002 WL 31628649. The Court of Appeal unanimously affirmed on preemption grounds, without reaching the First Amendment issue. Pet. App. 32a, 76a.[3]

4. The California Supreme Court unanimously affirmed, holding that Petitioners' effort "to regulate cigarette advertising on the ground that it targets minors and encourages them to begin smoking" was preempted by FCLAA under this Court's analysis in *Lorillard*. Pet. App. 28a.

The California Supreme Court acknowledged that in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th

---

[3] In the trial court, Petitioners also sought to raise a challenge to the marketing of "Lights" cigarettes, but they subsequently abandoned the claim on appeal, and the Court of Appeal expressly held that it had been waived. Pet. App. 34a-35a, n.5. Petitioners also argued in the Court of Appeal that Respondents had violated the UCL by falsely "*denying* they were targeting minors with their cigarette marketing strategies and denying cigarette smoking is addictive." Pet. App. 67a (emphasis added). The Court of Appeal, however, rejected these claims on state-law grounds, holding that Petitioners had waived some of these claims and had failed to support the remainder with admissible evidence. *Id.* at 67a-75a. Petitioners did not seek review of any of these rulings (including their waived Lights claim) in the California Supreme Court, *see* Respondents' Answer to Petition for Review in the Cal. S. Ct. at 24-26, and all such claims have been waived as a matter of state law. *See PLCM Group v. Drexler*, 22 Cal.4th 1084, 997 P.2d 511, 518 n.3 (2000). Accordingly, none of these claims is before this Court. *Adams v. Robertson*, 520 U.S. 83, 86-90 (1997).

1057, 875 P.2d 73 (1994), it had previously held that FCLAA did not preempt a similar youth advertising claim. Pet. App. 15a-17a. *Mangini* had held that the predicate for the claim (as in this case)—Penal Code § 308's prohibition on tobacco sales to minors—was not "based on smoking and health" because it was originally enacted out of concerns about "good morals" rather than health concerns. 875 P.2d at 81. In this case, however, the California Supreme Court concluded that *Mangini*'s analysis was no longer valid in light of *Lorillard*, which held, "in an opinion that is binding on this court, that concerns about youth smoking are inherently intertwined with, and cannot be validly distinguished from, concerns about smoking and health." Pet. App. 23a. In addition, the California Supreme Court held that the California Legislature's subsequent amendments to Penal Code § 308 had confirmed that the statute "is now unquestionably based in large part, if not entirely, on health concerns." *Id.*

The court noted that *Lorillard* had held that FCLAA would not preempt States from banning advertising that "constitutes an inchoate crime," but the court concluded that Petitioners' particular attempt to frame and support such a theory failed. Pet. App. 24a-25a. In particular, the court held that the First Amendment precluded Petitioners' attempt to recast a broad range of Respondents' advertising as criminal aiding and abetting of illegal sales. *Id.* Applying the four-part test for commercial speech restrictions established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the court held that the first three prongs "present no controversy here." Pet. App. 26a. However, Petitioners' theory failed on the fourth prong, because "treating [Respondents'] conduct in advertising their cigarettes

as aiding and abetting a violation of Penal Code section 308" was not reasonably tailored to the State's goals: "California has, and has employed, many other means of carrying out its policy of discouraging minors from smoking." *Id.* at 27a.

REASONS FOR DENYING THE PETITION

Petitioners seek review of an issue of federal preemption that this Court definitively addressed and resolved scarcely seven years ago in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), namely that a state-law claim based on concerns about "minors and cigarette advertising" is "based on smoking and health" under FCLAA. *Id.* at 550-51. In the proceedings below, the California Supreme Court expressly and properly overruled a contrary pre-*Lorillard* decision of that court, and its decision here does not conflict with any other appellate decision rendered since *Lorillard*. Beyond that, the California Supreme Court's decision merely applies the principles established in *Lorillard* to the particular facts of this case. In short, there is no split of authority on the preemption question presented, and the decision below largely involves a factbound—and correct—application of settled law to this specific factual record. The preemption issue raised in the Petition plainly does not merit review. *See post*, pp. 9-20.

Petitioners also seek review of the California Supreme Court's determination that the First Amendment does not permit Petitioners broadly to recast positive-image advertising of cigarettes as criminal aiding and abetting of illegal sales to minors. This question likewise does not warrant this Court's review. All parties agree that the First Amendment analysis here is governed by the four-part test established in *Central Hudson Gas & Elec.*

Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), and that was the test applied by the lower court. Pet. App. 25a-28a. In effect, Petitioners ask this Court to review the California Supreme Court's application of the *Central Hudson* test to the particular facts of this case, as presented on summary judgment. That question is not remotely certworthy. In any event, the lower court's First Amendment holding was unassailably correct in light of Petitioners' failures of proof, the gross overbreadth of their claims, and the availability and effectiveness of non-speech alternatives. *See post*, pp. 20-23.

The Petition should be denied.

I. The California Supreme Court's Preemption Holding Does Not Raise Any Conflict and Simply Applies This Court's Controlling Decision in *Lorillard* to the Specific Facts of This Case

In *Lorillard,* this Court resolved a then-existing split of authority among the lower courts (including the California Supreme Court) and held that state-law regulation of cigarette advertising based on "the specific concern about *minors* and cigarette advertising" is "based on smoking and health" within the meaning of FCLAA and therefore preempted. 533 U.S. at 550-51 (emphasis added). In the decision below, the California Supreme Court unanimously followed and applied *Lorillard* and accordingly overruled its contrary pre-*Lorillard* decision in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 875 P.2d 73 (1994). *See* Pet. App. 28a. The California Supreme Court's application of the controlling decision in *Lorillard* to the facts of this case does not raise any issue warranting this Court's review.

A. *Lorillard* Settled the Preemption Question Presented Here

Section 5(b) of FCLAA expressly preempts any state-law "requirement or prohibition *based on smoking and health* ... with respect to the advertising or promotion of any cigarettes ...." 15 U.S.C. § 1334(b) (emphasis added). In *Lorillard*, this Court addressed the extent to which this provision precludes state-imposed "requirement[s] or prohibition[s]" based on concerns that exposure to cigarette advertising induces minors to smoke. 533 U.S. at 540. After reviewing the significant changes that had been made to FCLAA by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (the 1969 Act), the Court held that Congress in the 1969 Act had "sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising" and that, in pursuit of that goal, "Congress banned electronic media advertising of cigarettes." 533 U.S. at 548. At the same time, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising, *it vested that authority in the FTC.*" *Id.* (emphasis added). The 1969 Act accomplished this latter objective by "expand[ing] the pre-emption provision with respect to the States, and at the same time, ... allow[ing] the FTC to regulate cigarette advertising." *Id.* at 545-46.[4]

Accordingly, *Lorillard* rejected a *Mangini*-style distinction between "the state's protective role" concerning minors and cigarettes, *Mangini*, 875 P.2d at 81, and the concern about smoking and health:

---

[4] Prior to the 1969 Act, the scope of the preemption provision was more narrowly drawn, but it extended to both regulation by the States *and* regulation by federal agencies. *Lorillard*, 533 U.S. at 543-44.

> "[W]e fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health and cigarette advertising especially in light of the fact that Congress crafted a legislative solution for those very concerns."

533 U.S. at 550-51. "At bottom," this Court explained, "the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Id.* at 548.

The California Supreme Court in this case reached the wholly unremarkable conclusion that, in construing FCLAA's "based on smoking and health" clause, it was obliged to follow this Court's decision in *Lorillard*, notwithstanding *Mangini*'s earlier contrary conclusions. Pet. App. 3a, 23a, 28a. Thus, the court below correctly observed that, while *Mangini* had drawn a distinction between "concerns about youth smoking" and "concerns about smoking and health," *Lorillard* rejected that very distinction and instead held that the two were "inherently intertwined." *Id.* at 22a-23a (citing *Lorillard*, 533 U.S. at 548). The California Supreme Court therefore held that, to the extent *Mangini* concluded otherwise, it "has been superseded by the high court's later decision in *Lorillard*, and *Mangini* is therefore overruled." *Id.* at 28a.

This Court's decision in *Lorillard* thus definitively settled the applicable legal standard, and the California Supreme Court properly conformed to that controlling standard in resolving this case. In view of the resulting uniformity on the underlying question presented, this Court's review is unnecessary.

B. The Opinion Below Does Not Conflict with Any Decision of this Court or of Any Other Appellate Court

Petitioners' strained efforts to conjure a conflict of authority are demonstrably wrong and ignore the record in this case.

Petitioners incorrectly contend that the California Supreme Court's decision in this case conflicts with the plurality opinion in *Cipollone*. Petitioners argue that, because this case "involve[s] enforcement of general legal principles of tort or unfair competition law," the state high court should have concluded that the "predicate duty" underlying their UCL claim was a generally applicable one that was not based on smoking and health. Pet. 17. This erroneous argument raises no certworthy issue.

Petitioners are simply wrong in contending that this case raises *any* issue about how FCLAA preemption applies in the context of a generally applicable statute. Pet. 18-19. Petitioners' argument overlooks the fact that the California Supreme Court expressly held that Petitioners' claim here "is based on *two* laws," namely, "Penal Code section 308" (which prohibits the sale of tobacco to minors) and "the state unfair competition law" (which generally prohibits unlawful and unfair business practices). Pet. App. 28a (emphasis added).[5] Because Petitioners' claim

---

[5] *See also* Pet. App. 22a ("Here, ... as in *Mangini*, plaintiffs' claim is based not only on the state unfair competition law *but also on Penal Code section 308*, which prohibits sales of tobacco products to minors and possession of tobacco products by minors.") (emphasis added). Indeed, Petitioners themselves acknowledge that their UCL claim rests critically on Penal Code § 308. *See, e.g.*, Pet. 9 ("[P]etitioners maintain that these actions constituted 'unlawful, unfair, or fraudulent' business practices under the UCL, because they encouraged violations of

thus rests critically on the tobacco-specific provisions of § 308, that claim—as a matter of state law—is *not* a generally applicable one, but is rather, a tobacco-specific one. Accordingly, as the case comes to this Court, it presents no question whatsoever about the application of FCLAA in the context of a generally applicable state law, and all of the Petition's verbiage on that subject is simply beside the point. Moreover, the California Supreme Court's state-law determination that Petitioners' claim is tobacco-specific is concededly fatal to Petitioners' entire argument: even Petitioners concede that a "tobacco-specific prohibition" on advertising is "based on smoking and health" under *Lorillard* and therefore preempted. Pet. 17; *see also Lorillard*, 533 U.S. at 549-50.

In any event, Petitioner's argument that the decision below conflicts with the plurality opinion in *Cipollone* is flatly wrong. Nothing in *Cipollone* even remotely suggests that, in determining what is "the legal duty that is the predicate" of a state-law claim, 505 U.S. at 524 (plurality), courts should ignore the *predicate statutes* (such as Penal Code § 308 here) on which the claim is based. And while Petitioners insist that their claim rests on a broadly defined duty prohibiting "business practices that encourage and profit from the violation of California laws and public policy," Pet. 15-16, the *Cipollone* plurality expressly rejected the view that the predicate legal duty of a state-law claim should be analyzed "at the highest level of generality." 505 U.S. at 530 n.27. Such an approach "would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act." *Id.*;

Penal Code section 308."); *id.* at 29 (acknowledging that "the law prohibiting the proposed transaction [here] is Section 308").

see also id. at 553-54 (opin. of Scalia, J.).[6]

Petitioners are also wrong in contending (Pet. 19) that the California Supreme Court's decision is "incompatible" with the analysis of the First Circuit in *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007), a case in which this Court recently granted certiorari. *See* 76 U.S.L.W. 3240 (Jan. 18, 2008). The very narrow FCLAA preemption issue presented on the unique record of this case is entirely distinct from the issues presented in *Good*. As explained earlier, the *sole* remaining state-law claim in this case is a claim that Respondents' advertising targeted youth, *see ante*, p.6, n.3, and that issue is squarely governed by this Court's decision in *Lorillard*—a fact that even the First Circuit itself recognized in *Good*. *See* 501 F.3d at 39 n.13 (discussing the California Supreme Court's opinion and agreeing that the result was "ordained" by *Lorillard*).

By contrast, *Good* arises in the context of a circuit split concerning whether certain false advertising claims are preempted by FCLAA under the approach articulated by the *Cipollone* plurality or otherwise. *Compare Good*, 501 F.3d at 41, *with Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th

---

[6] Petitioners' contention that the decision below conflicts with this Court's decision in *Bates v. Dow Agrosciences*, Pet. 20, is frivolous. In holding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not preempt state-law claims that impose requirements that parallel federal law, the Court relied on the "rather obvious textual differences" between the FCLAA and FIFRA preemption provisions, specifically noting that *"[u]nlike the pre-emption clause at issue in Cipollone,"* FIFRA "prohibits only state-law labeling and packaging requirements that are 'in addition to or different from' the labeling and packaging requirements under FIFRA." *Bates*, 544 U.S. at 446-47 (quoting 7 U.S.C. § 136v(b)) (emphasis added).

Cir. 2007). That conflict is simply not implicated by this case, which (as it comes to this Court) does *not* concern alleged false advertising—all such claims here have been waived as a matter of *state law*. *See ante*, p.6, n.3. And, as set forth above, any broader question concerning the applicability of the *Cipollone* plurality framework is likewise irrelevant to this case, which involves a tobacco-specific state-law claim that is governed by *Lorillard*. *See ante*, pp. 10-13.

Because the legal issues and factual context of *Good* are entirely distinct from this case, and because (as explained below) the judgment in this case also independently rests on First Amendment grounds, *see post*, pp. 20-23, the Petition here should not be held pending this Court's disposition of *Good*.

C. Because the California Supreme Court's Decision to Overrule *Mangini* Also Rested on Changes in State Law, this Case Presents a Poor Vehicle for Reviewing Any Preemption Issue

As the California Supreme Court explained, Petitioners' theory was that Respondents' advertising violates the UCL *because* it allegedly "encouraged or induced violation of Penal Code section 308." Pet. App. 5a. Contrary to its earlier holding in *Mangini*, the court below held that this latter statute, which "prohibits sales of tobacco products to minors and possession of tobacco products by minors," is "based on smoking and health." *Id.* at 22a-23a. In overruling *Mangini* on this point, the court rested on two separate grounds. First, the court followed this Court's subsequent and "binding" decision in *Lorillard*, which held that, as a matter of federal law, the concern about youth and smoking is inherently

"based on smoking and health." *Id.* at 23a-24a. Second, the California Supreme Court concluded that, even apart from this Court's decision in *Lorillard*, "the legislative history of recent amendments to [Penal Code § 308] shows that *it is now unquestionably based in large part, if not entirely, on health concerns.*" *Id.* at 23a (emphasis added).

The California Supreme Court's alternative reliance on a revised construction of state law weighs strongly against this Court's review. As this case comes to this Court, the court below has definitively construed the state-law claim in question as resting on a tobacco-specific statute that, in its current form, was concededly *motivated* by concerns about smoking and health. As a result, this case would be an exceptionally poor vehicle for analyzing any federal preemption issue, because with these findings, the claim here would be preempted under any conceivable interpretation of the phrase "based on smoking and health."[7]

Petitioners nonetheless suggest tha' the California Supreme Court should have held that Penal Code § 308 was not based on smoking and health because it is *also* based on concerns other than smoking and health. Pet. 26; *see also* Brief of *Amici Curiae* 17. Petitioners cite no preemption cases that would support such a view, which is in any event squarely contrary to settled law. *See, e.g., Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 106 (1992) ("Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act preemption

---

[7] This fact provides yet another reason why this case should not be held pending *Good*. *See ante*, pp. 14-15.

simply because the regulation serves several objectives rather than one.").[8]

D. The Opinion Below Does Not Give Respondents a "License" to Engage in Youth Marketing

Petitioners' suggestion that the opinion below grants an "unqualified license" to market cigarettes to minors (Pet. 39) is absurd. As an initial matter, each of the Respondents is a signatory to the Master Settlement Agreement (MSA) with the various States. *Lorillard*, 533 U.S. at 533. As the California Supreme Court expressly noted, the MSA bars Respondents "from '[t]aking any action, directly or indirectly, to target' minors in their advertising, promotion, or marketing of tobacco products." Pet. App. 3a-4a. Indeed, this youth-targeting prohibition of the MSA has been broadly construed and applied by the very same California courts that rejected Petitioners' claims here. *See, e.g., People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253, 11 Cal. Rptr. 3d 317, 345-47 (2004). Also, the FTC has specifically exercised its jurisdiction to challenge advertising that it believed targeted minors. 15 U.S.C. § 1336; *see also In re: R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999) (detailing the FTC's enforcement action challenging the "Joe Camel" ad campaign, and

---

[8] Petitioners remark in passing that *Lorillard*'s approach to preemption is "somewhat unusual[]," because it "attached significance to a state's *motive*." Pet. 13 (emphasis added). But there is nothing unusual about a federal statute in which "'part of the pre-empted field is defined by reference to the purpose of the state law in question,' and 'another part is defined by the state law's actual effect.'" *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (Energy Reorganization Act); *see also Gade*, 505 U.S. at 105 (same as to Occupational Health & Safety Act).

concluding that the matter was mooted by the MSA's prohibition on cartoon characters).

Even apart from these potent restraints against youth marketing, the decision below makes clear that Respondents do not have *carte blanche* to market cigarettes to minors. On the contrary, the California Supreme Court faithfully followed *Lorillard*'s holding that FCLAA "still leaves significant power in the hands of States to impose generally applicable zoning regulations and *to regulate conduct*." 533 U.S. at 551 (emphasis added). *See* Pet. App. 19a-20a, 24a-25a. Drawing upon First Amendment cases recognizing that speech proposing an illegal transaction is *wholly unprotected* and may be regulated as conduct rather than speech, *Lorillard* held that the State's non-preempted power to ban *sales* to minors necessarily included the power to "prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt." 533 U.S. at 552 (citing cases).[9] Here, the California Supreme Court expressly acknowledged these important limitations on the scope of preemption. Pet. App. 24a. The court found, however, that Petitioners' particular effort to assert such a non-preempted claim was factually unsupported and was too broad and unfocused to comport with settled First Amendment standards. *Id.* at 24a-28a. As explained below, that factbound holding does not merit this Court's review. *See post*, pp. 20-23.

---

[9] Because *Lorillard* expressly confirms that FCLAA preemption only reaches state-law requirements or prohibitions "with respect to the *advertising or promotion*" of cigarettes, and not sales *simpliciter*, *amici*'s contention that the decision below somehow threatens the enforceability of prohibitions against sales to minors, *see* Brief of *Amici Curiae* at 8-9, 20-21, is flatly incorrect.

Petitioners contend that the California Supreme Court took too narrow a view of *Lorillard*'s description of what FCLAA did not preempt, Pet. 23-25, but once again this argument raises an issue that is factbound, involves no split, and was correctly resolved below. Where, as here, there is "no evidence of *any* tobacco advertisements that expressly or directly encourage the purchase of tobacco by minors," *In re Tobacco Cases II*, 2002 WL 31628649, at *7 (emphasis added), the lower courts properly rejected Petitioners' contention that their allegations of "intentional[]" targeting of youth were alone sufficient to evade FCLAA. Pet. App. 24a-25a (Supreme Court); *see also id.* at 59a (Court of Appeal) (same). As the court below correctly held, Petitioners' subjective-intent-defeats-preemption argument finds no support in *Lorillard* and would "severely undermine[]" the "purpose underlying FCLAA preemption." Pet. App. 24a. This case well illustrates the point: notwithstanding the Petition's repeated rhetoric about intentional targeting, Petitioners' actual theory below was that the requisite intent could be broadly inferred if, for example, Respondents "knew to a substantial certainty" that their advertising would reach minors to the same extent it would reach adults. *See* Appellants' Opening Brief in the Cal. Supreme Ct. at 34 (emphasis omitted); *see also* Respondents' Answering Brief in the Cal. Supreme Ct. at 24. The California Supreme Court correctly recognized that Petitioners' malleable theory of subjective intent would effectively gut FCLAA's preemption provision. Pet. App. 24a-25a.[10] In any event, this case-specific determination

---

[10] Indeed, because Petitioners' claims below were focused on *magazine* advertising, they struck at the core of the area that Congress had sought to preempt from State-by-State regulation. *See Lorillard*, 533 U.S. at 593 (Stevens, J., concurring in part

does not raise any split of authority that would merit this Court's attention.

II. The California Supreme Court's First Amendment Holding Correctly Applies Well-Settled Law to the Facts of this Case

Petitioners' First Amendment question likewise raises no issue meriting this Court's review. In the proceedings below, the parties agreed that the First Amendment issues were governed by *Central Hudson*'s four-part test, and that is the same test that the California Supreme Court applied in assessing the viability of Petitioners' effort to treat Respondents' commercial advertising as "the aiding and abetting of a criminal offense." Pet. App. 27a-28a. Petitioners do not ask for this Court to reconsider any aspect of *Central Hudson*, and they do not identify any split of authority with respect to the lower court's resolution of the First Amendment issues. Instead, Petitioners merely challenge the California Supreme Court's application of two prongs of the *Central Hudson* test to this case. Pet. 29-39. That fact-specific argument manifestly does not merit review. In any event, the court below was correct in its unanimous holding that Petitioners' effort to recast Respondents' use of positive-image advertising as criminal aiding and abetting violated the First Amendment.[11]

---

and dissenting in part) (noting that one of Congress's main concerns in FCLAA was that "given the nature of publishing, it might well have been the case that cigarette companies would not have been able to advertise in national publications without violating the laws of some jurisdictions").

[11] Petitioners vaguely fault the California Supreme Court for limiting its focus to criminal aiding and abetting. Pet. 25. That focus, however, was simply a consequence of the particular theory that Petitioners chose to assert in an effort to fit within *Lorillard*'s express statement that "common inchoate offenses"

Petitioners argue that the California Supreme Court misapplied the first prong of *Central Hudson*, which asks whether the speech at issue "concern[s] lawful activity" and is not misleading. 447 U.S. at 566. However, Petitioners overlook this Court's explicit holding in *Lorillard* that "so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products." 533 U.S. at 571. Indeed, the courts consistently have held that advertising for products that are lawful only for adults are entitled to threshold First Amendment protection.[12] While speech that proposes an illegal transaction would not be protected under the first prong of *Central Hudson*, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), the lower courts

---

that attach to illegal sales to minors are not preempted, 533 U.S. at 552. *See* Pet. App. 25a (describing Petitioners' effort to articulate a non-preempted theory); *id.* at 52a (Court of Appeal opinion) (same); *id.* at 96a (trial court opinion) (same). That Petitioners now regret their particular choice of theory, and wish they had pressed a different argument below, provides no basis to fault the California Supreme Court's analysis or to merit this Court's review.

[12] *See, e.g., Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173, 184 (1999) (gambling advertisements satisfied "the first part of the *Central Hudson* test" because "[t]heir content is not misleading and concerns lawful activities, *i.e.*, private casino gambling in Louisiana and Mississippi"); *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (alcohol advertising is entitled to threshold protection even though "it might stimulate the thirst of a consumer to the point where he [or she] elects to violate" laws declaring some countries "dry"); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421 (D. Vt. 1998) (tobacco advertisements were constitutionally protected because they "attempt[ed] to appeal indiscriminately to any individual who views them; there is no contention here that the advertisements, whatever the marketing strategy behind them, say 'Kids, get your Camels here'").

here found that *Petitioners presented no evidence of any cigarette ads that proposed an illegal sale to minors*. *See ante*, p.19.

Nothing in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), even remotely casts doubt on the California Supreme Court's determination that Respondents' advertising is entitled to threshold First Amendment protection under the first prong of *Central Hudson*. Pet. 33-34. *Grokster* did not address the First Amendment at all, but merely held that a party could be liable for copyright infringement for allegedly distributing software with the intent to induce a third party to commit infringement. 545 U.S. at 918-19.

If anything, Petitioners' reliance on *Grokster*'s discussion of the *substantive* law of contributory copyright infringement points to yet another deficiency in their claims in this case. Here, the governing substantive law underlying Petitioners' claim is not the federal law of copyright, but California law of aiding and abetting. Although the California Supreme Court found it unnecessary to reach the point, the other courts below held that Petitioners' aiding and abetting theory failed to satisfy the elements of such a claim *as a matter of California law*. *See, e.g.*, Pet. App. 53a-54a (Petitioners failed to show Respondents "directly aid[ed] or encourage[d] *an identifiable perpetrator*," as required by California law) (emphasis added); *id.* at 96a-102a (same). That the California Supreme Court's rejection of Petitioners' aiding and abetting theory may readily be sustained on alternative state-law grounds provides an additional powerful point against review here.

Petitioners' remaining argument—that the California Supreme Court misapplied *Central Hudson*'s tailoring prong—is equally unsuited for review.

Notably, in the appellate courts below, Petitioners never argued that they could satisfy this narrow tailoring requirement; on the contrary, they rested *entirely* on the argument that Respondents' advertising was not even entitled to threshold First Amendment protection. *See* Respondents' Answering Brief in the Cal. S. Ct. at 47.

In any event, the tailoring argument that Petitioners make for the first time in this Court is patently meritless. As the trial court noted, Petitioners' UCL theory was "virtually limitless" in its breadth and effectively sought to proscribe all positive-image advertising for the cigarette brands in question. *In re Tobacco Cases II*, 2002 WL 31628649, at *8. Petitioners candidly sought to attach liability to all "use of advertisements containing content, themes and/or imagery which gives children under the age of 18 a false positive impression of smoking." *See* Respondents' Supp. Appendix in Cal. Ct. of App. at 820. Petitioners submitted a chart listing literally hundreds of ads that they contended violated the UCL, *id.* at 1220-82, including an ad showing nothing more than open countryside. Viewed against the backdrop of Petitioners' grossly overbroad theory, the California Supreme Court's observation that that theory overlooked the availability of non-speech alternatives is unassailable. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002) (a regulation fails "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech"); *see also Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (Alito, J.) (invalidating ban on alcohol advertising in university newspaper; the State "can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

February 2008

DANIEL P. COLLINS
Counsel of Record
GREGORY P. STONE
FRED A. ROWLEY, JR.
MUNGER, TOLLES & OLSON LLP
Counsel for Respondents

GERALD L. MCMAHON
DANIEL E. EATON
SELTZER CAPLAN
MCMAHON VITEK
Counsel for Respondent
Philip Morris USA, Inc.

H. JOSEPH ESCHER III
DECHERT LLP
WILLIAM T. PLESEC
JONES DAY
Counsel for Respondents
R.J. Reynolds Tobacco
Company and Brown &
Williamson Holdings, Inc.
(formerly known as Brown &
Williamson Tobacco
Corporation)

WILLIAM S. BOGGS
BRIAN A. FOSTER
DLA PIPER US LLP
Counsel for Respondent
Lorillard Tobacco Company